

including relatively new networks such as WB, UPN, Paxson, and a variety of home shopping stations. In the post-*Turner II* era, new analog stations continue to come on the air and invariably cause the deletion of existing popular cable programming services, and new cable programming services will have even greater difficulty launching.

Moreover, the analog stations affiliated with the major networks, and some major independent stations, have required cable operators to carry affiliated cable channels, pursuant to retransmission consent agreements. In the 1993 and 1996 must carry/retransmission consent elections, approximately 80% of broadcasters chose retransmission consent, indicating a strong bargaining position.^{50/} Broadcaster affiliated cable channels added under retransmission consent must be factored in to any calculation of the total number of set-aside channels on cable systems in order to assess the burden on cable operators of conferring on broadcasters additional digital must carry rights.

The Commission is well-aware that in October 1999, broadcasters will again have the right to elect either must carry or retransmission consent.^{51/} Unless the Commission acts to prohibit broadcasters from using retransmission consent to force cable operators to carry broadcasters' digital channels, cable operators may be required to delete more independent cable programming in order to carry broadcasters'

^{50/} *NPRM* at ¶133.

^{51/} 47 C.F.R. §76.64(f).

digital channels. Therefore, rather than conferring additional must carry rights on broadcasters, the Commission should limit broadcasters' retransmission consent rights, in order to preserve the Supreme Court's delicately created balance between cable operators' First Amendment rights, and the preservation of local broadcasting and program diversity.

B. Commission Attempts to Use Must Carry To Be the Guardian of New Technology Fail Under *Century*.

The Commission's claims in the *NPRM* are reminiscent of the Commission's failed arguments in *Century*.^{52/} There, as here, the Commission argued that must carry was crucial to allow consumers time to adopt to a new technology, in that case, the so-called "A/B switch."^{53/} The Commission argued it would take approximately five years for the public to adjust to the A/B switch, proposing a sunset date of January 15, 1992.^{54/} The court held that the Commission had not substantiated the need for must carry:

The difficulty is that here, as in *Quincy Cable TV*, the Commission's judgment that transitional rules are needed is predicated not upon substantial evidence but rather upon several highly dubious assertions of the Commission, from which we conclude that the need for a new saga of must carry rules is more speculative than real."^{55/}

^{52/} *Century*, 835 F.2d at 296.

^{53/} *Id.*

^{54/} *Report & Order*, 1 FCC Rcd at 886.

^{55/} *Century*, 835 F.2d at 300. The court also rejected a broadcasters' study as validation to the Commission's argument: "The NAB's study thus provided only the spongiest of foundations for the Commission's asserted justification for its regulations."

According to the Court, the Commission's A/B switch justification lacked any evidentiary record support.

[The Commission] puts forth no additional surveys, or polls, suggesting the likely pace of consumer adaption to the A/B switch technology. Nor does [the Commission] offer analogies illustrating how swiftly consumers have incorporated previous electronic innovations.^{56/}

The Commission's asserted justification for digital must carry also echos the language in its 1986 *Report & Order*.

In order to achieve the long-term goal of maximizing program choices to all viewers, we need to preserve cable subscribers' access to broadcast programming and to ensure that broadcast television remains a competitive alternative source of programming during the transition to the new environment. The interim must carry rules will meet this objective by preventing disruption of the flow of television services to the public during a five-year implementation period and by facilitating an orderly transition to a new market environment in which must carry regulation is no longer necessary because consumers have both the awareness and capability to use switching devices to alternate between cable and broadcast program sources.^{57/}

Now, as then, the Commission offers "scant evidence" to show that must carry is necessary to secure a transition to a new technology.^{58/} Neither the Commission nor

Id at 302.

^{56/} *Id.* at 300.

^{57/} 1 FCC Rcd at 889-90.

^{58/} Neither the Commission nor the industry can agree on whether digital television will be accepted by consumers. In a panel discussion before the annual convention of American Woman in Radio and Television, Commissioner Powell noted the uncertainty of digital broadcasting's future: "The government's timetable for switching to digital television broadcasts is 'far too aggressive' and may cause consumers to reject the technology. . . . The government-mandated schedule for constructing digital TV stations will force broadcasters to spend billions before they have any inkling of what type of

anyone else at this point in time can provide facts, statistics, economic reports, industry trends, or consumer research to support such claims because digital television has not been launched.

The Commission cannot rely upon the analog must carry record and must build a new record to justify a dual digital and analog must carry requirement. In *Century*, the D.C. Circuit held that any newly proposed must carry rules must be evaluated on their own terms based on a new record.^{59/} Yet, it is not possible to assemble the economic data necessary to justify dual must carry requirement or to show the current or future existence of harm to broadcasters as a result of GTE's proposal to adopt Option 7.

In *Century*, to justify a need for must carry, the Commission not only had conducted a rulemaking, receiving comments from the broadcast and cable industries, but also entered into the court record an industry study, containing supportive empirical data.^{60/} Nevertheless, the Court dismissed both the comments submitted in the rulemaking and the industry report as inadequate to justify the substantial burden on cable operators' First Amendment rights. Only after Congress undertook a fact finding

service consumers prefer . . . technology may never recover if customers reject the industry's initial service. . . . If viewers reject the technology, broadcasters may never return their analog spectrum to the government." *Broadcasting and Cable*, September 14, 1998 p14.

^{59/} 835 F.2d at 299.

^{60/} See *Century*, 835 F.2d at 300-01. The study examined the extent to which cable subscribers can view local, off-the-air signals without benefit of cable carriage based on a sample of 610 cable households nationwide. "Outdoor Antennas, Reception of Local Television Signals and Cable Television" prepared by the ELRA Group, Inc. for the NAB. *Report & Order*, 1 FCC Rcd at 870.

mission that lasted over three years and amounted to “tens of thousands of pages” and after the lower court continued building the record for an additional 18 months, did the Supreme Court find that the government had sustained its burden.^{61/}

The insurmountable difference here is that neither Congress nor the Commission can point to a history of digital broadcasting or digital cablecasting. Too many unknown variables exist with respect to the introduction of a new technology including what the availability and cost of digital equipment will be,^{62/} what, when, and how the interoperability issues will be resolved, what consumer demand will be for digital programming, and what the additional costs will be to cable subscribers to receive digital signals.^{63/} Any record the Commission could create now in support of its proposals would lack substantial evidence to justify the additional burdens on cable operators. The Commission’s statutory goals in the *NPRM* likely will be achieved

^{61/} *Turner II*, 117 S. Ct. at 1185.

^{62/} For instance, WBZ-TV, the CBS affiliate in Boston only recently signed a deal with an equipment manufacturer for antennas, transmission lines and combiners for DTV conversion. *Broadcasting & Cable*, Sept. 14, 1998, p.54.

^{63/} Digital television receivers have only begun to appear in the marketplace. Zenith, one of the earliest pioneers of HDTV, introduced its first digital HDTV receivers as recently as January 1998, and plans to ship digital HDTV sets to retail outlets sometime in the Fall 1998. The digital receiver/decoder has a manufacturer’s suggested list price of \$5,995. Zenith’s is only now beginning to offer its HDTV front-projection monitor at a list price of \$12,600. Press Release, “Zenith Unveils First HDTV Receivers” January 8, 1998. Sony Electronics, another leader in the development of digital television technology, also plans to offer its first consumer digital television products starting in the Fall of 1998. Press Release, “Sony Showcases Digital Entertainment Essentials at 1998 WCES” January 7, 1998. The price and availability of digital television receivers alone creates uncertainty to the success of digital television in the near future.

without cable carriage of dual digital signals during the nascent years of digital broadcasting development. To speculate upon the impact new must carry rules or the lack thereof would have on digital broadcasting is impermissible under *Century* and *Quincy*.^{64/} As the Court noted in *Quincy*, 768 F.2d at 1455, mere speculation cannot support infringement upon cablecaster's First Amendment rights:

At least in those instances in which both the existence of the problem and the beneficial effects of the agency's response to that problem are concededly susceptible of some empirical demonstration, the agency must do something more than merely posit the existence of the disease sought to be cured.

Avoiding artificial regulatory influences will allow marketplace factors to dictate consumer demand and the appropriate time for cable carriage of digital signals. The Commission should allow the quality of the programming offered by broadcasters to determine the success or failure of digital broadcasting, not government mandated cable content control.

GTE believes that, to put the issue succinctly, the *Turner* rationale is simply inapplicable to a new technology and the closest analogous case is *Century* where must carry rules adopted pursuant to a similar rulemaking proceeding and based upon an alleged need to transition to a new technology were struck down.

^{64/} The Commission cannot adopt digital must carry rules based on the (analog) must carry case history or the congressional record, as the introduction of digital broadcasting presents an entirely new paradigm in both the video distribution and programming markets.

V. CONCLUSION.


For the reasons stated herein, GTE believes that Option 7 is the only constitutionally and statutorily permissible option. The Commission simply should allow broadcasters to transfer must carry rights from analog channels to digital channels when they return their analog channels to the Commission.

Dated: October 13, 1998

Respectfully submitted,

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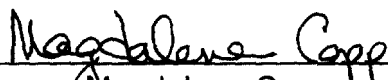
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